or by taking possession of the premises with a *bona fide* intention of permanently residing there, and subsequently removing: *Brundage* v. *Domestic Society*, 60 Barb. 204; *Hunt* v. *Beeson*, 18 Indiana 380; or by going to sea: *Shaw* v. *Steward*, 1 A. & E. 300; or by tempo ary absence: *Hart* v. *Chesley*, 18 N. H. 383; see *McKissick* v. *Pickle*, 16 Penn. St. 140; *aliter*, as to an absence of several years: *Crawford* v. *Patterson*, 11 Gratt. 364; or by the bankruptcy of the devisee: *Goldney's Case*, 3 Deac. 570; or by impossibility of performance through testator's act: *Bunbury* v. *Doran*, Irish R. (8 C. L.) 516, (9 C. L.) 284; *Hearn* v. *Cannon*, 4 Houst. 20; *Martin* v. *Ballou*, 13 Barb. 119; *Lamb* v. *Miller*, 18 Penn. St. 448; *Walker* v. *Walker*, 2 DeG., F. & J. 255; or by operation of law: *Adams* v. *Bass*, 18 Ga. 130; *Curry* v. *Curry*, 30 Id. 253; *Miller* v. *Lewis*, 33 Id. 61; *Tennille* v. *Phelps*, 49 Id. 532; *Maddox* v. *Maddox*, 11 Gratt. 804; or by the voluntary release or waiver of the person entitled to a performance: *Jones* v. *Bramblet*, 1 Scam. 276; *Petro* v. *Cassiday*, 13 Ind. 289; *Boone* v. *Tipton*, 15 Id. 270; *Rush* v. *Rush*, 40 Id. 183; *Crawford* v. *Woods*, 6 Bush 200; *Wilson* v. *Wilson*, 38 Me. 18; *Simonds* v. *Simonds*, 3 Metc. 558; *Spaulding* v. *Hallenbeck*, 39 Barb. 79; *Brewster* v. *Brewster*, 4 Sandf. Ch. 22; *Buckmaster* v. *Needham*, 22 Vt. 617; *Wells* v. *Wells*, 37 Id. 483; see *Frost* v. *Butler*, 7 Me. 225; *Manwell* v. *Briggs*, 17 Vt. 176; *Hubbard* v. *Hubbard*, 12 Allen 586.

JOHN H. STEWART.

Supreme Court of Kansas.

THE STATE *v.* FRED. M. SPAULDING.

Certain parties called as jurors testified on their *voir dire* that they had heard, or read of the matters charged in the information, and had formed opinions thereon; but it appearing from the whole of their examinations that such opinions were not settled, or fixed, and that they could give full and fair consideration to all the testimony and be guided solely by it in their conclusions, it is held that the challenges were properly overruled.

Defendant was city clerk. By ordinance, it was his duty to prepare and seal city licenses upon production to him of the receipt of the city treasurer showing that the license-money had been paid. In fact, for years the custom had been for the licensee to pay the money directly to the clerk and receive from him the license, and the clerk thereafter handed the money to the treasurer. The entire business was transacted by the clerk. This was done to the knowledge of the mayor, council and other officers of the city. Defendant embezzled certain of the moneys thus received by him. It did not appear that the city ever disavowed this authority, or ever made any effort to re-collect from the licensees these moneys. *Held*, That a conviction under an information charging the embezzlement of these as the moneys of the city must be sustained, and that though neither the city nor the licensees might have been concluded by his acts, yet, that he, by the issue of the license, was estopped from denying that the moneys which he had received in payment thereof were the moneys of the city.

INFORMATION for embezzlement. Trial at the December Term 1879, of the District Court, and verdict and judgment for The

State. The defendant appealed. The facts are stated in the opinion.

Thomas P. Fenlon and *Lucien Baker*, for appellant.

Joseph W. Taylor, *N. H. Wood* and *E. L. Carney* (City Attorney), for The State.

The opinion of the court was delivered by

BREWER, J.—[After discussing a matter of local practice and interest.] * * *

A second matter is the alleged error in overruling the challenges of certain jurors. One juror testified that he had an opinion, founded upon rumor, that public money was missing; that he had no opinion as to the guilt or innocence of defendant; and that he believed defendant was city clerk. Another, that he had an opinion that public money was lost or stolen; that he had, on reading of the matter, made no inquiry whether it was true or false; and that his opinion would not influence him in any way in the trial of the case; and that he could give due consideration to the testimony. A third gave substantially the same answers to the questions put to him. Within the rule laid down in the *Medlicott Case*, 9 Kas. 257, we think the challenges were properly overruled. It does not appear that either of these parties had such settled opinions or convictions as would prevent them from being impartial jurors. A matter of this kind always gets into the papers, and is the subject of talk in the community, and it would be almost impossible to find an intelligent man in the county who had not read or heard of it. The use of the word "opinion" is not always conclusive. If unexplained, and upon an essential and disputed fact, it may be: *The State* v. *Brown*, 15 Kas. 400. But the real condition of the juror's mind is to be determined from the whole of his testimony. He may have heard or read, but if he appears free to give full consideration to all the testimony, and to be influenced by it alone, he is competent. So far as the fact that defendant was city clerk is concerned, we do not think that actual knowledge thereof would disqualify. There are facts in many cases which must be proved, and yet facts which all men know. The fact that a certain party is an incumbent of a prominent public office, is one which it would be difficult, if not impossible, to find a citizen ignorant of. In a prosecution for malfeasance

in that office, must the knowledge of such incumbency disqualify a juror? If a public building is destroyed by fire, every one knows of it. Could no man sit as a juror upon the trial of one charged with setting it on fire who knew that the building had been burned? We think the jurors were competent, and the rulings of the District Court correct.

We pass now to the vital question in the case, one very forcibly presented and fully discussed by counsel on both sides, and one of great difficulty. The facts upon which this question arises are these: Defendant was the city clerk; the money which he is charged with embezzling came from two sources—licenses, and from what is known as the "dog tax." Under the city ordinances, applicants for licenses were required to pay the license fee to the city treasurer, who issued duplicate receipts therefor, upon the production of which the license was to issue. The city clerk prepared and attested the license, which was signed by the mayor, but he had nothing to do with the receipt of the money. The provisions concerning the dog tax were different, for as to that the ordinance in terms authorized the clerk to receive the tax, and thereafter pay it over to the city treasurer. Unquestionably this money, while in his hands, was city money, and an embezzlement of it was an embezzlement of city funds. But this was only a small portion of the moneys charged to have been embezzled. By far the larger portion was received from licenses, and this license-money was received by him under a custom which had existed for years, and to the knowledge of the mayor, council and other officers of the city. The applicant for a license would go to the city clerk, pay him the money, and receive the license, which he would take to the mayor for his signature. This money, thus received, was thereafter paid over by the clerk to the treasurer. In other words, to avoid the circuity of going to the treasurer, obtaining his receipt, and with that obtaining from the clerk the license, the business was transacted directly with the clerk. This, starting as a matter of convenience, had been for years an established custom. The license-money all passed through this channel into the hands of the treasurer. It did not appear that the city had ever disavowed defendant's authority to receive these moneys, or had ever made any effort to re-collect them from the licensees.

Upon these facts, defendant asked the court to instruct the jury that no conviction could be had for embezzling this license-money,

inasmuch as the charge was of embezzling money of the city, and this money never having passed into the hands of the treasurer, was still the money of the various licensees, or at any rate was not the money of the city. This the court refused to give, and on the other hand, charged in substance, that the city was an incorporation, and might employ agents without providing therefor by ordinance, and that if one, with the assent of the mayor and council, acting in the capacity of agent, clerk, servant or bailee to the city should receive moneys belonging to the city and embezzle them, he might be convicted, although the ordinances provided that all dues of the city should be payable to the city treasurer. Upon these facts it is strenuously insisted by defendant that, within the ruling in the case of *The Hartford Insurance Co.* v. *The State*, 9 Kas. 210, this money was still the money of the licensees. In that case the law required that the license-fee should be paid into the state treasury before any license should be issued by the auditor. There, as here, the insurance companies had been in the habit of transacting their business entirely with the auditor, paying him the money and receiving from him the license, and leaving the auditor to settle with the treasurer. After the receipt by the auditor of the money, and the issue by him of the license, but before any money had been paid to the treasurer, the old law was repealed and a new law enacted. It was held by this court that the new law controlled, that the license was improperly issued, and that the auditor in receiving the money was the agent of the insurance company, and not of the state. In the opinion, KINGMAN, C. J., says: "The limits of an officer's authority are found in the law." And again: "If the corporation chose to pay this (the license-money) through the auditor, then for that purpose the auditor was the agent of the corporation, and not of the state; and until the money reached the state treasury, it was under the control of the corporation, and not of the state." The same doctrine was re-affirmed in the case of *The City of Eureka* v. *Davis*, 21 Kas. 578. The ordinances give to a city officer the limits of his authority precisely as the statutes give to the state officer his limits. The city is not bound by the acts of the one outside of those limits, any more than the state by the like acts of the other. The money paid by the licensees to the clerk was within their control until paid to the treasurer. They could recall and recover it. The city could ignore the payment, and collect it

again. That the licensees have not asserted their right, does not disprove its existence. They may yet assert it and recover their money, and the city may yet call upon them for the license fees. As their money, they may prosecute for its embezzlement, and this prosecution would be no bar. He may yet, and rightly, pay it back to them, or they may recover it by suit; and then upon what will this prosecution rest? The anomaly would be presented of a conviction for embezzling certain moneys as the property of one party, and a judgment asserting that it belongs to another. The question is not one simply of moral turpitude, but of legal right. The defendant is entitled to protection against several prosecutions for the one wrong.

On the other hand, the state rests upon the broad proposition, that when a party assumes to act for another, he is concluded by that assumption, no matter who else is bound; that if A. assumes to act as the agent of B., and receives money belonging to B., he cannot thereafter deny that it is B.'s money, and that, notwithstanding B. is not concluded by his acts, and though in fact he was not the agent of B.; that this doctrine, universally recognised in civil, is equally true in criminal law. A man may not say, "I have the right to receive money," and receive it, and then, when challenged for its receipt or embezzlement, avoid liability by saying, "I had no right to receive it." He has voluntarily assumed a position, the responsibilities of which he may not avoid. The defendant may not say that he holds this money simply for the licensees, because he himself has issued the licenses, which he might rightfully issue only when the city had received the money; that by issuing, he conclusively, so far as he was concerned, affirmed that the money he had received and was holding, was city money. The law of estoppel binds him, whether it binds any one else or not, and is equally potent in a criminal as well as a civil action. Concede that there may be a difference between a private and a municipal corporation, as to whether the corporation is bound by the knowledge of its officers of the acts of the assumed agent, for the by-laws of the former are known only to its officers, and if they permit one to continue acting as agent, outside the scope of his actual powers, parties dealing with him may be justified in presuming that his apparent are his real powers, and so hold the corporation to his acts. While the ordinances of the latter are of public knowledge, and every one is chargeable with

notice of the limit of his powers as defined by the ordinances, yet, so far as the agent is concerned, the rule is the same, and whether he be acting for an individual, a private or a municipal corporation, he binds himself at least and equally in all three cases. It is indeed further said that this was, in law and in fact, the city's money; that the doctrine of ratification applies; that any principal may ratify the acts of an assumed agent, and that such ratification is equivalent to prior authority; that here the city council, the mayor and other officers had full knowledge of the manner of conducting the license collections; that for years they permitted it to continue in this way, and that permitting it to be so done was equivalent to granting authority to so do it; that the city has never attempted to re-collect this license-money, nor the licensees to recover it from the clerk, and that therefore all parties in interest have assented to this manner of doing business, and that it would be the height of legal absurdity to permit the chief actor, the real wrongdoer, to dispute the authority he has assumed and avoid liability for a crime which his own assumption of authority has alone given him power to commit. Reference is made to 2 Whart. on Crim. Law, 7th ed., sect. 1920, in which the author says that "while the reason of the thing requires that the money embezzled should have been received by the defendant within the orbit of his employment, yet where he succeeds in getting money on the basis of such employment from third parties, and when there is a legal duty resting on him to pay over such money to his employers, then the embezzlement of such money is within the statute."

In *Ex parte Hedley*, 31 Cal. 108, the court ruled that "if an agent obtains the money of his principal in the capacity of an agent, but still in a manner in which he was not authorized by his agency to receive it, and converts the same to his own use with intent to steal or embezzle it, it is money received 'in the course of his employment as agent.'" It is true that case is not parallel with this, for in that it appeared that the master paid the checks of the agent, supposing them to have been drawn in the prosecution of the agency; he actually obtained the principal's money. In *Rex* v. *Beechey*, 1 R. & R. 318, a clerk authorized to receive money *at home* from out-door *collectors*, received it *abroad* from out-door *customers;* yet the case was held to be within the statute. See also *Rex* v. *Williams*, 6 C. & P. 626.

Bishop, in his work on Criminal Law, 3d ed., sect. 367, says that "in reason, whenever a man claims to be a servant while getting into his possession, by force of his claim, the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply in the criminal?" See also the case of *The State* v. *William H. Heath*, recently decided in the Court of Appeals of St. Louis county, Mo. In that case the defendant was auditor, and as such had charge of the bonds and mortgages given to secure the money loans of the schools, but the money was payable to and receivable by the treasurer. Still for several years the money was actually received by him, and the county court allowed him compensation for his services in the matter. He embezzled these funds, and it was held that he might be convicted of embezzling public funds received by him as agent of the county. The actual relation of principal and agent was held sufficient; the existence of a legal relation was unnecessary.

We are of opinion that the argument of the state is the better, and that the ruling of the District Court must be sustained. We intend no departure from the views expressed in the case of the *Hartford Ins. Co.* v. *The State, supra.* We do not affirm that the city was concluded by the defendant's acts, nor indeed that any one is estopped but himself. But we hold that when one assumes to act as agent for another, he may not, when challenged for those acts, deny his agency; that he is estopped not merely as against his assumed principal, but also as against the state; that one who is agent enough to receive money, is agent enough to be punished for embezzling it. An agency *de facto*, an actual, even though not legal, employment is sufficient. The language of the statute is: "If any officer, agent, clerk or servant of any incorporation, or any person *employed in such capacity*:" Crimes Act, sect. 88.

Further, that the defendant received this money as the money of the city, is conclusively as against him, shown by his issue of the license, for he was authorized to issue that only after the city had obtained possession of the money. The issue was an affirmance by him that all things preliminary thereto had been performed, among which was, that the title to the money had passed from the licensee to the city—an affirmance which he might not thereafter deny.

This is not the case of a single or an occasional payment by a debtor of the city to an officer thereof of his debt, where such officer is charged with no duty springing out of the receipt by the city of its debt, and is not the legal custodian of the city's moneys. Thus the officer might be, to the common understanding of all parties, simply the agent of the debtor, acting merely to accommodate him. Here, by settled course of business, payment of the city's dues was made to and received by the defendant. While such payment might not legally conclude the city, yet the evident understanding of all, the defendant included, was, that payment had actually been made; that the money was now the property of the city, and that the license for which the money was due, might properly issue, and it was issued, and by defendant. He voluntarily assumed full charge of this entire matter, including the receipt of the money and the issue of the license. The money was paid to him because of his office and to induce his official action; and he may not now say that it was not received "by virtue of his employment or office," or that its receipt was not one of the prescribed legal duties of such office. In the case of *Regina* v. *Orman*, 36 Eng. L. & Eq. 611, it appeared that defendant was employed in the service of the justices of Bedfordshire, as storekeeper and clerk of the prison, under the governor of the county jail, and on his appointment received written instructions, in which nothing was said about the receipt of money. His duty was to keep an account of sales and make out bills of parcels and receipts. The governor usually received the money, but in his absence the defendant sometimes did. In such case, the course of business was to enter the receipt on the same day and hand the money to the governor. It was held that he might be convicted of embezzling this money, as the money of the justices. JERVIS, C. J., said: "If he was *de facto* employed to receive money, it does not matter whether the rules or instructions defined the employment or not." So it may be said here, that if defendant was *de facto* employed to receive this money, it matters not to him whether the ordinances prescribed that as his duty or not. He may not enter into the employment, and then deny its terms or responsibilities. He is estopped from saying that this money, which he embezzled, is not the money of the city.

We see nothing in the rulings of the District Court materially

prejudicial to the rights of defendant, and therefore the judgment must be affirmed.

It has been remarked by a learned judge, in relation to the disqualification of jurors by reason of the formation or expression of opinions, concerning the guilt or innocence of the accused, that "upon no one question of civil or criminal practice have the decisions of courts been mor inharmonious, than upon this question of qualification or disqualification of jurors, arising from the formation or expression of opinion of the guilt or innocence of the accused:" *People* v. *Reynolds*, 16 Cal. 128, 132. And in another case it has been said, that to attempt to harmonize cases and deduce a uniform rule therefrom, would be an "almost interminable task," adding that "the decisions of scarcely any one state are reconcilable with each other, and the mind would be lost in bewilderment at the threshold of the attempt," and upon this subject "our jurisprudence is launched upon a sea of chaos:" *Rothschild* v. *State*, 7 Texas Court of Appeals 542.

We, therefore, have no intention of attempting to reconcile cases which are unquestionably irreconcilable, nor of deducing a uniform rule which should govern all cases. All that we can hope to do is to present the different theories which are held upon the subject, as we find them illustrated by the cases.

I. It has been held in a few cases that the formation of an opinion of the guilt or innocence of the accused will not disqualify a person from acting as a juror, unless he has given *expression* to that opinion: *Boardman* v. *Wood*, 3 Verm. 570 (1831); *State* v. *Clark*, 42 Id. 629 (1870); *State* v. *Phair*, 48 Id. 366 (1875); *State* v. *Tatro*, 50 Id. 489 (1878); *State* v. *Morea*, 2 Ala. 275 (1841); *Hudgins* v. *State*, 2 Kelly (Ga.) 173, 180 (1847); *Griffin* v. *State*, 15 Ga. 476. See also *Barker* v. *State*, 15 Ga. 500 (1854); *State* v. *Anderson*, 5 Harr. (Del.) 493, (1854). And in *State* v. *Allen*, 46 Conn. 531, 546, stress is laid upon the fact that the opinion of the juror had been "*declared.*" The case in Alabama, was one in which the opinion was based on rumor, but the decision seemed to turn upon the fact that it had never been *expressed.* In *Hudgins* v. *State*, *supra*, the court said that "the weight of authority is that a juror is not disqualified unless he has *expressed* as well as formed an opinion in the case." These decisions rest upon the probable bias which the expression of an opinion is deemed likely to produce. And it seems to be regarded as immaterial that the juror thinks that he can try the case impartially. In *State* v. *Clark*, *supra*, the juror declared on his *voir dire* that he had no opinion in relation to the prisoner's guilt or innocence, and thought that he could try the case fairly and impartially. But he was held incompetent as he had previously expressed an opinion. The court held that it was entirely immaterial that *he* thought he could try the case fairly, and said that as soon as it appeared that a juror had *expressed* an opinion, it followed at once *as a matter of law*, that he was incompetent. But in *State* v. *Hayden*, 51 Verm. 307 (1878), the Vermont court places itself more nearly in harmony with the current authorities by declaring that the opinion, the expression of which disqualifies, "must be an unqualified one, and based upon something more substantial than mere rumor."

II. On the other hand, it is held that the forming of a *decided* opinion is sufficient to disqualify a juror, although he has not given it expression: *People* v. *Rathbun*, 21 Wend. 509, 542 (1839). But it is not necessary to multiply authorities upon this point, as it will sufficiently

appear hereafter that the rule so long held in Vermont, and which was announced at an early day in Georgia and Alabama, is not upheld by the current authorities.

III. It is held that the formation or expression of a settled opinion as to the guilt or innocence of an accused, will render a juror incompetent. Stress being laid not upon the fact that the opinion has been *expressed*, but upon the fact that the opinion which is entertained is of a *fixed* and *settled* character: *Anderson* v. *State*, 14 Ga. 709 (1854); *Maddox* v. *State*, 32 Ga. 581 (1861); *Boon* v. *State*, 1 Kelly 619 (1846); *Cancemi* v. *People*, 16 N. Y. 501 (1858); *Ex parte Vermilyea*, 6 Cowen 555 (1826); *Jackson* v. *Commonwealth*, 23 Gratt. (Va.) 927 (1873); *Brakefield* v. *State*, 1 Sneed 215 (1853); *Curry* v. *State*, 4 Nebraska 551 (1875); *Trimble* v. *State*, 2 G. Greene 404; *State* v. *Jones*, 80 N. C. 415 (1879). In *Commonwealth* v. *Webster*, 5 Cush. 297 (1850), Chief Justice SHAW said: "the opinion or judgment must be something more than a vague impression formed from casual conversations with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question, as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence." And in *State* v. *Crawford*, 11 Kans. 42, it is said that impressions not amounting to an opinion will not disqualify.

1. The opinion to disqualify must be one which the juror entertains at his *voir dire*, a renounced opinion does not disqualify: *Rothschild* v. *State*, 7 Texas Court of Appeals 520 (1880); *Grissom* v. *State*, 8 Id. 386 (1880); *People* v. *Vermilyea*, 7 Cowen 369 (1827).

2. The opinion should be one upon the merits, and not upon some particular features of the case. In *State* v. *Thompson*, 9 Iowa 188 (1859); a juror was said not to be dfsqualified, who had formed and expressed an opinion as to the fact of the killing, but not as to the guilt of the defendant. And in *Elbin* v. *Wilson*, 33 Md. 135 (1870), it is said that the opinion must be one that goes to the merits. In *Dew* v. *McDivitt*, 31 Ohio St. 139 (1876), it has been said that where a juror has formed or expressed an opinion in relation to a portion of the facts embraced in issue, but not upon the whole issue, and he otherwise stands indifferent, the allowance or refusal of a challenge is discretionary. See *Ogle* v. *State*, 33 Miss. 383 (1857). In *Brown* v. *State*, 57 Miss. 424 (1879), it was held that whenever a juror had a clear and settled conviction and opinion upon a fact which was so connected with the main fact in issue, that it would be difficult to disbelieve the co-existence of the main fact which is usually associated with the fact believed, he should be held incompetent. In that case the prisoner was on trial for perjury in testifying to a false alibi on the trial of one W. for arson. The juror had stated that he had not formed or expressed any opinion as to the guilt or innocence of the prisoner, but had formed a decided opinion as to the guilt or innocence of W., on whose trial for arson the alleged perjury was committed. He was held disqualified to serve as juror.

IV. In a few cases it has been held that the formation and expression of an opinion will not disqualify, unless made under such circumstances as to imply malice or ill-will against the prisoner. "It has been supposed that an opinion of guilt founded upon newspaper reports or other information, or personal knowledge, disqualifies a man from being a juror. But this is not so. * * * A declaration of opinion to disqualify a juror, therefore, must be such an one as implies malice or ill-will against the prisoner, thereby showing that the person challenged does not stand indifferent between the state and him:" *State* v. *Spencer*, 21 N. J. 196 (1846); *State* v. *Fox*, 25 Id.

566 (1856). These cases rest upon the rule as stated at an early day by Hawkins to the effect that if the opinion was not expressed from any ill-will to the party it was no cause of challenge: 2 Hawk. P. C. C. 43, § 28, and see *King* v. *Edmonds*, 4 B. & A. 470. But this is not the rule in this country, although it is recognised by the courts of New Jersey. The courts of other states prefer to follow the rule announced by Chief Justice MARSHALL in Burr's case, when he said: "Light impressions, which may be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him:" 1 Burr's Trial 416. See *Ex parte Vermilyea*, 6 Cowen 555, 563; *People* v. *Vermilyea*, 7 Id. 108; *Smith* v. *Eames*, 3 Scam. 76; as well as the cases cited in the section next preceding this.

V. It seems to be generally admitted that if the opinion which the juror entertains is merely hypothetical, being based on rumors, he is not thereby disqualified. In *People* v. *Reynolds*, 16 Cal. 128, 133, the court say: "The mere fact that a person hears or reads a statement, especially an *ex parte* statement does not imply that he believes it, or recognises it as true, although he may draw an inference from it which may amount to an opinion; but if this inference or opinion be conditional or qualified, for example, if it depends upon the facts turning out as stated in the account read or heard, this would not as a matter of law, disqualify the juror on exception for implied bias."

In *Smith* v. *Eames*, 3 Scam. 76 (1841), a juror was held competent who stated that he had formed and expressed an opinion based upon the rumors which he had heard, and that he still entertained the same opinion, if the rumors were true. The court laid down the rule as follows: "If a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is positive, *and not hypothetical*, and such will probably prevent him from giving an impartial verdict, the challenge should be allowed. If the opinion be merely of a light and transient character, such as is usually formed by persons in every community, upon hearing a current report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind, and a fixed conclusion thereon, or if it be hypothetical, the challenge ought not to be allowed."

This rule was followed in *Gardner* v. *The People*, 3 Scam. 83, decided at the same term, and where the juror had expressed an opinion by saying: "If the reports are true, my opinion is so and so." And in *Baxter* v. *People*, 3 Gilm. 368, 378 (1846), where the juror had formed and expressed an opinion from reports or rumors on the hypothesis that they were true, but who had no opinion as to whether the rumors were true or false, and whose opinion was not of a fixed and definite character. The same doctrine was adhered to in *Leach* v. *The People*, 53 Ill. 316 (1870).

In *Mitchum* v. *State*, 11 Ga. 615, 636 (1852), the doctrine is asserted that a hypothetical opinion based on rumor is not a disqualification. So, too, in *Mercer* v. *State*, 17 Ga. 146 (1855), where the juror had said in reference to the rumor concerning the prisoner "if that were so he ought to be hung." Also in *Wright* v. *State*, 18 Ga. 383 (1855), where the juror had stated that if what he had heard should prove true, the prisoner ought to be hung. In *State* v. *Kingsbury*, 58 Me. 245 (1870), the court

say that "a conditional, contingent, hypothetical, indeterminate, floating, indefinite, uncertain opinion," will not render a juror incompetent. The same doctrine is asserted in *Sam* v. *State*, 13 S. & M. 189, 194 (1849), and in *Lee* v. *State*, 45 Miss. 118 (1871).

In Alabama, a juror was held competent who had formed a hypothetical opinion based on rumors which he believed to be true, saying, "*if* the report was true the prisoner ought to be hung, and that he still thought so if the report was true." On his *voir dire* he declared that if the evidence turned out differently, his former opinion would not influence his verdict: *State* v. *Williams*, 3 Stew. 454 (1831). In *Carson* v. *State*, 50 Ala. 134 (1873), a juror was held qualified who stated that he believed defendant guilty from what he had heard, but if the evidence should show him to be innocent, his belief would not bias his verdict. In *Hall* v. *State*, 51 Ala. 9 (1874), a juror was held competent who had an opinion based on rumor, and who stated that "from what he had heard he did not know whether he could give the defendant or the state justice, but supposed he could." In California a juror was held competent whose opinion was based on rumors which he said he had no reason to disbelieve, saying that "if the facts turned out the same, his opinion was formed:" *People* v. *Williams*, 17 Cal. 142 (1860). In *Durell* v. *Mosher*, 8 Johns. 445 (1811), a juror was held competent who stated that if the reports of the neighbors were correct, the defendant was wrong and the plaintiff was right. While in *Thomas* v. *People*, 67 N. Y. 218 (1876), a juror was held qualified who had formed and expressed an opinion based on rumor, upon the supposition that the rumor was true, saying that he believed the rumor to be true, and that it would take evidence to change his opinion, that he would not go into the jury box entirely unbiased, but that he thought he could render an impartial verdict, one not affected by the opinion he then held.

And in *Burk* v. *State*, 27 Ind. 430, a juror was held competent, who, when interrogated at his *voir dire*, answered that he had formed an opinion of defendant's guilt, if what he had heard was true. So in *Wormeley* v. *Commonwealth*, 10 Gratt. (Va.) 658 (1853), a juror was regarded as qualified who entertained a hypothetical opinion, which he stated it would require evidence to remove. While in *Alfred* v. *State*, 2 Swan (Tenn.) 581 (1853), a juror stated that "he had heard that Peck's negroes had killed him, that he believed it, and could not do otherwise, as he had the evidence of the country, that his opinion was based on rumor, but that his mind was biased thereby." He was held not to be disqualified. This appears to be going further than the previous cases, for the juror evidently had something more than a mere hypothetical opinion, although it was one based upon rumor. And it seems that there are cases which hold that where the opinion is founded upon rumors, that the juror shall not be disqualified thereby. Such was the ruling in *Thompson* v. *State*, 24 Ga. 297 (1858), where the opinion was based on rumor, but did not otherwise appear to have been hypothetical. So in *Westmoreland* v. *State*, 45 Ga. 225 (1872), although in this case the juror disclaimed having any prejudice or bias against the prisoner. See also *Jim* v. *State*, 15 Ga. 544 (1854). In Louisiana it is said that an opinion predicated upon rumor when there is no bias or prejudice in the mind of the juror is not a disqualification:" *State* v. *Bunger*, 14 La. Ann. 462 (1859); *State* v. *Williams*, 29 La. Ann. 646, (1877). In Tennessee the rule is firmly established in accordance with the rule laid down in *Alfred* v. *State*, *supra*, that the opinions of a juror, founded on rumor, will not disqualify him: *Magor* v. *State*, 4 Sneed 598; *Moses* v. *State*, 11 Hum. 232. In Indiana it has been

held, where the opinion of the juror was founded on rumor, there being no evidence that it proceeded from ill-will to the accused, or that it was so firmly settled as to justify a belief that the juror would not do the defendant justice, that a challenge could not be sustained: *McGregg* v. *State*, 4 Blackf. 101; *Van Vacter* v. *McKillip*, 7 Id. 578. And in Texas a juror was held to be not disqualified, who entertained an opinion based on rumor, and which it required evidence to remove: *Thomas* v. *State*, 36 Texas 315; *Tooney* v. *State*, 8 Texas Court of Appeals 452. All these cases may be brought into harmony with the foregoing cases cited as holding that *hypothetical* opinions are no disqualification, if the presumption may be indulged that all opinions founded upon rumor are to be regarded as *primâ facie* hypothetical. In Virginia it has been held in numerous cases that an opinion founded on rumor is *primâ facie* hypothetical. The presumption does not seem to us to be an unreasonable one, as all opinions which have no other basis than rumor must be formed upon the assumption that the rumor is true. Assuming that the facts are as represented, then such and such a conclusion follows. An opinion so formed is far more likely to be contingent and hypothetical than settled and determined. See *Armistead's Case*, 11 Leigh 657; *Epes's Case*, 5 Gratt. 676, 681; *Jackson* v. *Commonwealth*, 23 Id. 919, 928.

In addition to the cases already cited, as holding jurors not disqualified by reason of hypothetical opinions entertained by them, see *Irvine* v. *Lumbermen's Bank*, 2 W. & S. 202; *Osiander* v. *Commonwealth*, 3 Leigh 780; *Mann* v. *Glover*, 14 N. J. Law 195, 201; *State* v. *Spencer*, 21 Id. 198; *State* v. *Hinkle*, 6 Iowa 380; *State* v. *Ostrander*, 18 Id. 451; *Palmer* v. *People*, 4 Neb. 75; *Collins* v. *People*, 48 Ill. 146.

VI. Opinions derived from newspaper statements in relation to the case are not a disqualification, provided they are such as will readily yield to the evidence which may be adduced on the trial, and it appears that the juror can give the defendant a fair and impartial trial. This may now be accepted as the general rule, notwithstanding a few opinions to the contrary.

In the unreported case of *Coleman* v. *Hagerman*, cited in 6 Cowen 564, 565, and in 4 Wend. 243, 244, a juror was rejected for having expressed an opinion founded on newspaper publications, although he stated at his *voir dire*, that he had no bias or partiality. And in *People* v. *Mather*, 4 Wend. 229 (1830), a juror was rejected as being disqualified, who stated that he entertained no fixed opinion upon the subject of the defendant's guilt, but that he had an impression derived from the newspapers, and that if the evidence supported what he had read he had a fixed opinion, but that if those circumstances should not be proved, he should not consider the accused guilty. "We are asked in this case," said the court, "to distinguish between an opinion formed by being an eye-witness of a transaction, or by hearing the testimony of those who were such witnesses, and an opinion founded on rumors, reports and newspaper publications, and to say the former shall be evidence of partiality and the latter not. If any distinction is to be made, *I should be inclined to adopt the reverse of that contended for at bar.*" In *Commonwealth* v. *Knapp*, 9 Pick. 496 (1830), a challenge for cause was sustained where a juror admitted having a prejudice against the prisoner from what he had read in the papers, but said that he had no definite opinion as to his innocence or guilt, and that he would be governed by the evidence. But a much more liberal view now prevails, as it was found next to impossible to secure an intelligent jury if every man was to be excluded who had formed an opinion from what he had read in the newspapers. The absurdity of the old rule was well illustrated in the

trial of the persons engaged in the "Anti-rent" agitation in New York. The court sat ten to twelve hours a day for two weeks, endeavoring to obtain a jury. Six thousand jurors were summoned, four thousand were challenged, and only ten were found qualified. All effort to obtain a jury was then abandoned, and a change of venire was had. This state of things was a necessary consequence of the rule which the New York court had laid down in *People* v. *Bodine*, 1 Denio 281 (1845), and which excluded every one having any opinion upon the matter in controversy.

In *Staup* v. *Commonmealth*, 74 Penn. St. 458 (1873), the Supreme Court of Pennsylvania laid down the rule as follows: "Where the opinions or impressions of the juror are founded on rumor or reports, or even newspaper statements, which the juror feels conscious he can dismiss; where he has no fixed belief or prejudice, and is able to say he can fairly try the prisoner on the evidence, freed from the influence of such opinion or impressions, he ought not to be excluded:" In *O'Mara* v. *Commonwealth*, 75 Penn. St. 424 (1874), the same court held a juror competent who had formed an opinion from newspapers, which opinion would follow him into the jury box, but who declared that he had not formed such an opinion as would influence him in rendering a verdict unless the evidence sustained it. In *Ortwein* v. *Commonwealth*, 76 Penn. St. 414 (1874), the juror had formed an opinion which he stated would require evidence to remove, his opinion being formed from what he had read in the newspapers. He was held not disqualified, the court saying "that evidence would be required to change their first impressions has but little weight. Such must always be the fact, even in the case of slight impressions or loose opinions." The inquiry must turn upon the character of the opinion. "Is it a prejudgment of the case? Has it such fixedness and strength as will probably influence and control the juror's verdict, or has it been formed upon the same evidence substantially as will be given upon the trial?" Again in *Curley* v. *Commonwealth*, 84 Penn. St. 151 (1877); a juror was held competent who had formed an opinion from what he had read, but who did not think his opinion so fixed and determined that he would not be governed by the evidence and who felt sure it would not prejudice the prisoner.

In *State* v. *Wilson*, 38 Conn. 126 (1871), a juror was held qualified who had formed an opinion from what he had read in the newspapers; who believed what he had read, and still entertained his opinion so formed, as he had seen no occasion to change it, but who stated that his opinion would yield to evidence, and who *thought* he could try the case impartially, but would not say positively that he could do so. "If he is free from partiality or prejudice derived from any other source, his opinion is, as a matter of course, hypothetical, not fixed or settled in the sense in which those terms are used, when used correctly in the law. All men take newspaper statements as current news, liable to qualification, explanation or contradiction, and when qualified, explained or contradicted they change their opinions or belief, accordingly, as matter of course." See also *State* v. *Potter*, 18 Conn. 166.

In *State* v. *Lawrence*, 38 Iowa 54 (1873), a juror was held competent who had read the newspaper accounts of the murder, and who believed that it had been committed by the prisoner, stating that it would take some evidence or explanation to remove that opinion from his mind, but that he thought that he could try the case impartially. A juror was held competent under very similar circumstances in *State* v. *Bruce*, 48 Iowa 530 (1878), the court saying, "That an opinion, however strong it may be, founded upon newspaper reports, or other hearsay evidence, will prevent a

juror from rendering an impartial verdict, we do not believe. Men of sufficient intelligence and capacity to properly discharge the duties of jurors, can certainly divest their minds of any opinion founded upon hearsay, and determine the guilt or innocence of the accusee upon the evidence produced upon the trial, and on that alone. It would be a reproach upon the administration of justice to require jurors to be selected from that class of persons who do not or cannot read the current events of the day, and are totally ignorant of what is transpiring around them, or from that other class, if such there be, who, having read, have no opinion upon the subjects about which they read."

In *Pender* v. *People*, 18 Hun 560, (1879), the Supreme Court of New York held a juror competent who had read the newspaper account of the crime, and who had formed therefrom an opinion which it would require evidence to remove, but who declared that it would not influence his verdict which he believed he could render impartially. In *Balbo* v. *People*, 19 Hun 424 (1879), the same court held a juror not disqualified who had formed an opinion from newspaper reading, which he supposed he still entertained, but who said that he did not think it would prevent him from acting impartially and that his verdict would not be biased by it. So in *Cox* v. *People*, 19 Hun 430, a juror was considered qualified who had read of the case in the newspapers and formed therefrom a decided opinion, which it would require evidence to remove, saying that he would enter the jury box with the opinion still existing, but that he thought that he would be governed in his verdict by the evidence which should be introduced, adding that his opinion was based on the supposition that what he had read was true, but that he did not know whether it was true or false.

It has been held in Indiana, that a juror was not incompetent by reason of a previously formed opinion, provided it would not require either more or less evidence to satisfy the mind of the existence or non-existence of the material facts involved. See *Fahnestock* v. *State*, 23 Ind. 231; *Morgan* v. *State*, 31 Id. 193; *Clem* v. *State*, 33 Id. 418; *Cluck* v. *State*, 40 Id. 263; *Hart* v. *State*, 57 Id. 102. In *Guetig* v. *State*, 66 Ind. 94 (1879), a juror was held qualified whose opinion it would require evidence to change, but who stated that it would readily yield to evidence. The Supreme Court of Michigan, in *Ulrich* v. *People*, 39 Mich. 245 (1878), declared that a juror was not disqualified by having formed an opinion from reading the newspapers, although it would take evidence to remove it, it not being of a fixed character. While, in Illinois, in a recent case, it is said that the fact that it requires some evidence to remove such an opinion will not disqualify the juror if he thinks he can give a fair and impartial verdict: *Wilson* v. *People*, 94 Ill. 299 (1880). In *State* v. *Pike*, 49 N. H. 399 (1870), the juror had read the reports in the newspapers, and derived an impression of the guilt of the accused, but thought his opinion would not bias his verdict. He was held competent. In *Cooper* v. *State*, 16 Ohio St. 328 (1865), a juror is said to be competent, notwithstanding the formation of an opinion from the reading of newspapers, provided the court is satisfied he will render an impartial verdict. See, too, *Frazier* v. *State*, 23 Ohio St. 551.

In the particular case, none of the jurors appear to have had any opinion as to the guilt or innocence of the accused; but it is plain that even had they entertained an opinion that the accused was guilty of the crime alleged, they would not thereby have necessarily been disqualified from serving as jurors upon the trial of the case. The jurors in the particular case simply had an opinion that public money was either *lost or stolen*. To have held such jurors dis-

qualified by reason of entertaining such opinions, would certainly have required the court to go very much beyond what the authorities would warrant. It would, in effect, require the adoption of a rule which would exclude all jurors who believed a crime had been committed, even though they had no opinion as to the guilt or innocence of the party who happened to be charged with its commission. It would require even more than this, as the jurors, in the particular case, did not even have an opinion that a crime had been committed, as they did not profess to say that they believed the money had been stolen, but only that it had been *either* lost *or* stolen. To ask a court to exclude jurors for such reasons, is to ask it to adopt an unnecessarily harsh, and a seemingly too restrictive rule.

VII. There is a manifest distinction to be drawn between opinions formed from the reading of newspaper statements concerning a crime, and opinions formed after reading the evidence as given by witnesses upon a former trial of the accused. It is manifest that opinions formed from mere newspaper rumors, must be less fixed and settled than those formed after reading testimony of the witnesses as given upon the trial. There has been a difference of opinion as to whether jurors, whose opinions had been formed in the latter way, should be held to be disqualified or not.

In *Phelps* v. *People*, 72 N. Y. 334 (1878), a juror was held qualified who had read an account of the previous trial, as given in the newspapers, and had formed and expressed an opinion thereon, which he still entertained, and who stated that he thought that the opinion would, in a measure, bias his mind, but did not think it would prejudice his verdict. But in *Greenfield* v. *People*, 74 N. Y. 277 (1878), the same court expressed itself as follows: "We are of the mind, that one who has formed an opinion or impression from the reading or report, partial or complete of the criminatory testimony against a prisoner, on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror, and will give an impartial verdict thereon, unbiased and uninfluenced by that impression, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted." A juror, whose opinion had been formed as above stated, was rejected.

In *Black* v. *State*, 42 Texas 377 (1875), a juror was held incompetent who had read the testimony in the case of one jointly indicted with the prisoner, and had formed an opinion as to the guilt of the accused, which it would require other and different testimony to change, but who thought that his opinion would not influence his verdict in the slightest degree, nor prevent him from giving the accused a fair trial. But in *Grissom* v. *State*, 4 Texas Court of Appeals 384 (1878), a juror was held competent who had formed an opinion from reading the evidence given upon the former trial of the accused, and who stated that if the evidence given on the second trial should turn out to be the same as that given on the former trial, his opinion would be the same. He added, that he did not think his opinion would prevent him from giving the accused a fair trial. And in *Gietig* v. *State*, 66 Ind. 94 (1879), a juror was regarded as qualified who had read the evidence given on the former trial, and had formed and expressed an opinion thereon which it would require evidence to change, saying, however, that his opinion would readily yield to the evidence. But we find the Supreme Court of Pennsylvania, saying, in *Staup* v. *Commonwealth*, 74 Penn. St. 458 (1873), that, "Whenever, therefore, the opinion of the juror has been formed upon *the evidence given in the trial at a former time*, or has been so deliberately entertained

that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. In such a case the bias must be too strong to be easily shaken off, and the prisoner ought not to be subjected to the chance of conviction it necessarily begets." And in *Jackson* v. *Commonwealth*, 23 Gratt. (Va.) 927, 928 (1873), it is said, that "if a veniremen has formed an opinion as to guilt or innocence of the accused from having heard the evidence on a former trial or examination of the case, it would be difficult, if not impossible, to regard such opinion otherwise than as decided or substantial within the meaning of the rule; and he would generally, if not always, be considered an incompetent juror, even though he might think and say he could give the accused an impartial trial." But the court, in the above case, held a juror competent who had formed and expressed an opinion, based upon what certain persons had told him was the evidence given at the coroner's inquest, but whose opinion was not a decided one, and who believed he could render an impartial verdict. And in *Smith* v. *Commonwealth*, 7 Gratt. 593 (1850), the doctrine was announced, that it was not a valid objection to a juror that he entertained a decided opinion of the prisoner's guilt, formed from reading the testimony upon a former trial, provided, he thinks it would not influence his judgment, and that he could give the prisoner a fair trial according to the evidence as submitted. In Ohio, a juror is incompetent who has formed an opinion on reading reports of the testimony of the witnesses, being excluded by statutory provisions. See *Frazier* v. *State*, 23 Ohio St. 551. But the authorities are so divided that the question must be regarded as an open one.

VIII. It is evident, from the foregoing cases, that the courts, except in Vermont, and perhaps in one or two other states, do not attach importance to the fact that the juror has *expressed* an opinion. If an opinion has been expressed, the courts look to the nature of the opinion and to the basis of it, and if the opinion is not so fixed and settled as to prevent a fair and impartial trial, the juror is held to be qualified. And, in determining this question, the juror's opinion that he can do equal and exact justice, and that the opinion which he entertains will not bias his judgment, cannot be accepted as conclusive of the fact. It is impossible for a person always to know what effect his opinions may have in influencing his judgment. He may be entirely honest and sincere in the belief that his judgment will not be biased in the least, and yet wholly unknown to himself, he may be very largely influenced by preconceived opinions. See *Rothschild* v. *State*, 7 Texas Court of Appeals 544; *People* v. *Mather*, 4 Wend. 229; *People* v. *Gehr*, 8 Cal. 359; *Armistead* v. *Commonwealth*, 11 Leigh 657; *Staup* v. *Commonwealth*, 74 Penn. St. 458; *Cotton* v. *State*, 31 Miss. 504.

The length of this note precludes the consideration of disqualifications growing out of opinions based upon conversations with the parties, the witnesses, or the jurors who served upon the former trial of the accused. But see *State* v. *Ward*, 14 La. Ann. 673; *Quesenberry* v. *State*, 3 Stew. & P. 308; *Logan* v. *State*, 50 Miss. 269; *Ned* v. *State*, 7 Porter (Ala.) 187; *Nelms* v. *State*, 13 S. & M. 500; *Sam* v. *State*, 13 Id. 189; *Shields* v. *State*, 8 Texas Court of Appeals 427; *Thomson* v. *People*, 24 Ill. 61.

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